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NEWSLETTER

Selling Viatical Agreements Does Not Constitute the "Business of Insurance" under Insurance Agency's E&O Policy

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A Texas appellate court has held that a professional liability policy issued to an insurance agency did not provide coverage for litigation based on the sale of viatical agreements because the litigation did not arise out of the "business of insurance." *Employers Reinsurance Corp. v. Threkeld & Co. Ins. Agency*, 2003 WL 22724617 (Tex. App. Nov. 19, 2003).

An insurance company issued a professional liability policy to an insurance agency that provided coverage for "any negligent act, error or omission...arising out of the conduct of the business of the Insured in rendering services for others as a general insurance agent, insurance agent or insurance broker...." The agency was sued by investors in viatical agreements that it marketed. A viatical agreement is an arrangement whereby a person, usually terminally ill, is immediately paid a sum less than the expected death benefit of his or her life insurance in exchange for transferring his or her rights to the policy benefits upon death. The underlying plaintiffs alleged that the agency acted fraudulently and negligently by marketing agreements that turned out to be worthless because the underlying life insurance policies were cancelled on the grounds that they were fraudulently obtained. Coverage litigation followed.

The appeals court held that coverage was not available because "a viatical settlement is not an insurance policy, and the business of selling fractional interests in insurance policies is no part of the 'business of insurance.'" The court reasoned, among other things, that the agency did not "receive and collect consideration for insurance" when it paid premiums on behalf of the terminally ill person in facilitating the transfer of the underlying policies to the investors. The court also explained that the agency was not "representing an insurer" when it brokered the transfer of the underlying insurance policies to the investors it solicited. Since the viatical agreements are not part of the "business of insurance," the court held that the insuring agreement unambiguously did not provide coverage.

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